Supreme Court, U.S.
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No. 96-1531

In The

Supreme Court of the United States

October Term, 1996

W. DAVID LEAK, M.D. and PAIN CONTROL CONSULTANTS, INC.,

Petitioners,

vs.

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D. and PAUL ADDESSI, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GRANT MEDICAL CENTER, PAUL ADDESSI, M.D. AND BHAGWAN SATIANI, M.D.

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I

STATEMENT OF THE CASE

Petitioner Dr. Leak is a Columbus, Ohio-based physician who specializes in pain medicine. He has staff privileges at two Columbus hospitals, which, according to Dr. Leak's evidence in opposition to Respondents' Motion for Summary Judgment, are participating hospitals in at least seven managed care plans and three traditional insurance plans.

Despite this, Petitioners Dr. Leak and his professional corporation, PCC, Inc., brought this antitrust action alleging that they are unable to compete in the market for pain management services. Petitioners claim they are unable to compete because certain managed care plans designate Respondent Grant Medical Center as a participating hospital but do not also designate either of the two hospitals where Dr. Leak has privileges. Petitioners did not join any managed care plans as parties to this action.

All Respondents filed motions for summary judgment on the basis that Dr. Leak and his professional corporation did not have standing to prosecute a private antitrust claim. Before ruling on the motions, the trial court granted Petitioners' request for additional time to conduct discovery on the standing issue. Petitioners undertook very little discovery during the additional seven months available to them and used none of it to oppose the Respondents' motions for summary judgment.

REASONS FOR DENYING THE WRIT

I.

NO CONFLICT OF LAW EXISTS AMONG THE CIRCUITS.

Petitioners ask for a writ of certiorari so this Court can resolve an alleged conflict of law among the circuit courts in regard to antitrust standing. Petitioners also argue that the decision below is in "direct conflict" with *Summit Health, LTD v. Pinhas*, 500 U.S. 322 (1991). Petition at 16-17. This Court need not grant the writ, however, because no conflict exists among the circuit courts with regard to antitrust standing and no conflict exists between the decision below and *Summit Health*.[1]

In order to find a conflict, Petitioners focus on semantics rather than on the substantial meaning of what the circuit courts say about antitrust standing. Petitioners argue that the purported conflict is caused by inconsistent application of the antitrust standing requirements set out in *Associated Gen. Contractors of California, Inc. v. Carpenters*, 459 U.S. 519 (1983).

Associated Gen. Contractors holds that an antitrust plaintiff must plead and prove both antitrust injury and antitrust standing.

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1. Petitioners' reference to *Summit Health* in this standing case is puzzling. That case presented a jurisdictional question — whether the denial of hospital privileges to a single physician presented "a sufficient nexus with interstate commerce to support federal jurisdiction." 500 U.S. at 333. Petitioners quote from Justice Scalia's dissent as if it were the holding of the Court and then proceed to a confusing explanation of why they believe the decision below is in conflict with *Summit Health*. Petition at 17. In any event, that case provides no guidance with regard to antitrust standing and nothing further will be said about it in this brief.

Antitrust injury satisfies the constitutional standing requirement of an actual case or controversy. But, as *Associated Gen. Contractors* held, constitutional standing alone is not enough to allow a claimant to prosecute an antitrust action. Under *Associated Gen. Contractors*, it is possible that a person injured by a violation of the antitrust laws is not a proper person to bring a private antitrust claim.

In *Associated Gen. Contractors*, which was an appeal from an order of dismissal under F.R.C.P. 12, it was not necessary to determine whether the plaintiffs would be able to prove the first requirement, antitrust injury. The injury was well-pleaded and assumed, thus satisfying the constitutional standing requirement of an actual case or controversy. Thus, the only question in *Associated Gen. Contractors* was whether the plaintiffs had antitrust standing or, as the court stated, were "proper part[ies] to bring a private antitrust action." *Id.* at 535 n. 31.

The Court's discussion of the factors necessary to answer its question — nature of the injury, character of the relationship between the violation and the injury, potential for duplicative recovery or complex apportionment of damages, and whether there existed more direct victims of the alleged violation — later formed the core of antitrust standing analysis. Each of these factors assumes antitrust injury; they are intended to guide only the determination of whether an injured person is a proper party to prosecute a private antitrust action. *Id.*

Circuit courts, including those cited by Petitioners and the Sixth Circuit in this case, have been remarkably consistent in their application and analysis of the *Associated Gen. Contractors* antitrust standing factors. The only difference between the two lines of cases Petitioners cite is whether antitrust injury is regarded as a part of antitrust standing or as a separate, preliminary requirement. In either case, antitrust injury is required.

Whether the plaintiff suffered an antitrust injury became the first prong of the Second Circuit's standing analysis in *Balaklaw v. Lovell*, 14 F.3d 793 (2nd Cir. 1994). The *Balaklaw* court paraphrased footnote 31 from *Associated Gen. Contractors*, stating that "in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury." *Id.* at 797.

In a footnote of its own, the *Balaklaw* court characterized the standing analysis as "two-pronged." "As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the [*Associated Gen. Contractors*] factors . . . prevent the plaintiff from being an efficient enforcer of the antitrust laws." *Id.* at 797 n. 9. The term "efficient enforcer" is a shorthand reference to the antitrust standing analysis required by *Associated Gen. Contractors*.

Balaklaw was decided on a motion for summary judgment, so it was necessary for the Circuit Court to determine if a genuine issue of any material fact existed that would require a trial. The Circuit Court concluded as a matter of law that there was no antitrust injury, so it did not address the second prong of its standing analysis. Had it done so, it would have addressed the factors discussed in *Associated Gen. Contractors*. *Id.*

Petitioners also cite *Walker v. U-Haul Co. of Mississippi*, 734 F.2d 1068 (5th Cir. 1984), as an illustration of two-pronged standing analysis. *Walker*, like *Balaklaw*, was decided on a motion for summary judgment. The *Walker* court recognized, as *Associated Gen. Contractors* requires, that proof of both antitrust injury and antitrust standing is essential to recovery on an antitrust claim. *Id.* at 1073. The Circuit Court, affirming summary judgment, found that the plaintiff had not raised any genuine issue of material fact "in regard to [defendant's] claimed antitrust violations." *Id.* at 1074.

Having concluded that the defendant had not violated the antitrust laws, the *Walker* court had no reason to address the *Associated Gen. Contractors* antitrust standing factors. As the Circuit Court explained, "standing defines the plaintiff's right to sue and the existence of injury is a component of the substantive right." *Id.* at 1073.

Petitioners contrast this two-prong form of the analysis with what they call a "multifactor" analysis, exemplified by *Bodie-Rickett and Assocs. v. Mars, Inc.*, 957 F.2d 287 (6th Cir. 1992), and *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1992). *Bodie-Rickett* identified five factors derived from *Associated Gen. Contractors* "on which the standing issue turns . . . ." 957 F.2d at 290.

Despite Petitioners' claim that the *Balaklaw* and *Walker* line of cases conflicts with the *Bodie-Rickett* and *Greater Rockford* line, even their discussion of the alleged difference illustrates that the perceived conflict is an argument over nothing more than semantics. For example, they use almost identical words to describe both lines of cases. According to Petitioners, *Balaklaw* and *Walker* "require a plaintiff asserting an antitrust claim to demonstrate both antitrust injury and antitrust standing," and *Bodie-Rickett* and *Greater Rockford* require "both antitrust injury and standing, using a multifactor, case by case analysis of standing." Petition at 12, 14.

In support of their conclusion that these two lines of cases conflict, Petitioners can muster only a reference to *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991). They quote the Circuit Court's statement that "antitrust standing has become somewhat confused." *Id.* at 1449 (quoting *Local Beauty Supply, Inc. v. Lamar, Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986)).

Todorov described its approach as two-pronged: "First, the court should determine whether the plaintiff suffered 'antitrust injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." *Id.* The reference to "directness or remoteness" is but another shorthand reference to the *Associated Gen. Contractors* antitrust standing factors.

Courts that describe their analysis as two-pronged first determine whether the plaintiff has suffered an antitrust injury and then proceed to apply the *Associated Gen. Contractors* factors to determine whether that injured person has antitrust standing. Courts that describe their antitrust standing analysis as multipart also first determine whether the plaintiff has suffered an antitrust injury and then go on to apply the *Associated Gen. Contractors* factors.

Both lines of cases apply the *Associated Gen. Contractors* factors. The only difference between the two lines of cases is that the first treats antitrust injury as a separate element of an antitrust claim, while the second treats antitrust injury as part of antitrust standing. This is a distinction without a difference. Petitioners are not the first to notice this insignificant distinction. In fact, one of the cases they cite, *Greater Rockford*, persuasively explains why it is a distinction without a difference:

> "Standing" may be broadly construed to involve all the elements of the cause of action. That is, a plaintiff may not have "standing" unless he can satisfy each requirement of the § 4 action — antitrust violation, antitrust injury and proximate cause. There is some logic to this interpretation, for as we shall discuss, *infra*,

> "standing" limits access to the cause of action to those properly suited to vindicate the violation. A person cannot be the most effective plaintiff if he cannot satisfy all of the elements of § 4. For purposes of clarity and in accord with what seems to be the approach of this circuit, we prefer, however, to treat antitrust injury and standing separately. We will, therefore, refer to standing only when discussing the element of proximate cause. Of course, this is merely a matter of semantics and the essential elements of the § 4 action remain the same under either approach.

Greater Rockford, 998 F.2d at 395 n. 7 (citations omitted).

There is no conflict among the circuits. This Court has more important issues to decide than whether the circuit courts are accurately counting the parts of the antitrust standing analysis.

II.

THE OTHER ISSUES PETITIONERS RAISE ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT IN THIS CASE.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This is not one of those rare cases.

Petitioners assert that summary judgment was erroneously based on an improper inference that Dr. Leak is fully able to

compete in the marketplace for pain management services because he holds privileges at two hospitals other than Grant. Dr. Leak argues that this inference was improper because it was against him, which is not permitted in a summary judgment proceeding.

It is well-settled that inferences drawn from evidence presented in summary judgment proceedings must be construed in favor of the party opposing the motion. *See, e.g., Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold*, 369 U.S. 654, 655 (1962). The trial court followed this rule.

In its decision, the court expressly stated that "[t]he evidence must be viewed in the light most favorable to the nonmoving party." Appendix at 6. In fact, the trial court devoted two full pages of its decision to properly stating the rules for decisions on summary judgment motions. Appendix at 6-8.

The evidence before the trial court on the question of Dr. Leak's ability to compete was provided by Dr. Leak. He submitted an affidavit with an attached listing of managed care and traditional insurance plans and the hospitals in the Columbus area each of the plans designates as "participating."

Seven of the managed care plans and three of the traditional insurance plans on Dr. Leak's list designate as participating hospitals either or both of the hospitals where Dr. Leak has privileges. On the record, the trial court was correct to find as a matter of law that Dr. Leak was not foreclosed from competing with other pain management physicians.[2]

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2. Dr. Leak attempts to avoid this evidence by claiming that "no member of the medical staff of Grant or [Respondent Grant Anesthesia Associates, Inc.] has training or qualifications comparable to Dr. Leak's in the field of (Cont'd)

This Court need not take this case to set forth or clarify the law in regard to inferences in summary judgment proceedings. The law in that regard is clear and the trial court applied the correct rule of law.

Petitioners also assert that the exclusive contract between Grant and GAA is an unlawful tying arrangement and a group boycott. The culprit, according to Petitioners, however, is not Grant, but managed care. Insurance companies, according to Petitioners, restrict competition for those patients who belong to managed care plans that designate Grant or another hospital other than those two where Dr. Leak has privileges as participating hospitals.

If Petitioners have a grievance with the managed care plans, this is not the place to resolve it — Petitioners chose not to join any managed care plans as parties to this action. This is an inappropriate case to attempt to determine whether the intersection of exclusive hospital contracts and managed care amounts to an antitrust violation for which Petitioners have standing to sue.

(Cont'd)

pain medicine" and that he is the only Columbus physician "who practices pain medicine." Petition at 6, 17. These statements are untrue. The contract between Grant and GAA provides that GAA is responsible for "the development, implementation, and continuous improvement in a comprehensive pain management program in cooperation with the Hospital." A quick reference to the Columbus, Ohio telephone yellow pages directory lists other physicians specializing in "pain management," including a group at Ohio State University Medical Center.

CONCLUSION

The petition for a writ of certiorari should be denied because the law among the circuit courts in regard to the test for antitrust standing is not in conflict. Furthermore, none of the other issues Petitioners raise are appropriate for review by this Court in this case.

Respectfully submitted,

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